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No. 81-2188

In The

Supreme Court of the United States

October Term 1982

THE STATE OF MONTANA, et al.,

Petitioner,

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE CHIPPEWA-CREE TRIBES OF THE ROCKY BOYS RESERVATION, MONTANA, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

This brief is submitted with the written consent of all parties to the case, lodged with the Clerk.

Amicus Chippewa-Cree Tribes of the Rocky Boys Reservation, Montana, is

directly interested in this proceeding because the United States purports to represent the interests of the Tribes in United States v. Aageson, et al., No. CV-79-21-GF, CA-80-3032, 80-3044, one of the cases consolidated with Montana v. Northern Cheyenne Tribe in these proceedings.

The Aageson case was filed in United States District Court for the District of Montana in April, 1979 to adjudicate water rights in the Milk River system bordering or traversing the Rocky Boys, Blackfeet, Fort Belknap and Fort Peck Indian Reservations in Montana. The United States claimed reserved rights on its own behalf and as fiduciary for the Tribes of the four reservations, including the Chippewa-Cree Tribes of the Rocky Boys Reservation. The United States is subject to serious conflicts of interest, and cannot adequately represent the

interests of the Chippewa-Cree Tribes in any water rights adjudication proceedings.

The Chippewa-Cree Tribes did not intervene in United States v. Aageson, supra, in the District Court due to lack of sufficient resources and lack of tribal counsel. The Tribes will strongly consider intervening if the decision of the Ninth Circuit Court of Appeals in the instant case is upheld.

ARGUMENT

WATER RIGHTS ADJUDICATION PROCEEDINGS IN MONTANA STATE COURTS CANNOT BE COMPREHENSIVE BECAUSE CONFLICTS OF INTEREST PREVENT THE UNITED STATES FROM ADEQUATELY REPRESENTING THE INTERESTS OF THE CHIPPEWA-CREE TRIBES.

In United States v. Aageson, supra, the United States claims water rights on its own behalf and as fiduciary for the Chippewa-Cree Tribes of the Rocky Boys Reservation, the Blackfeet Tribe of the Blackfeet Reservation, the Gros Ventre and Assiniboine Tribes of the Fort Belknap

Reservation, and the Sioux and Assiniboine Tribes of the Fort Peck Indian Reservation. The United States is subject to serious conflicts of interest in asserting water rights claims on behalf of the Chippewa-Cree Tribes, as well as rights claimed by the United States on its own behalf and rights claimed by the United States on behalf of the three other Indian reservations on the Milk River System. In its complaint in United States v. Aageson, the United States claims water rights for a wide variety of federal projects and federal purposes, most notably the Milk River Project of the Bureau of Reclamation, whose claimed priority dates conflict with the interests of the Chippewa-Cree Tribes. Moreover, the United States also claims water rights as fiduciary on behalf of the Fort Belknap and Fort Peck Indian Reservations in such quantities and with such priority dates

as to potentially deprive the Chippewa-Cree Tribes of their water supply. The Milk River has long been over-appropriated, and consequently all water rights on the River are mutually adverse.

In discussing the factors identified by this Court in Colorado River Conservation District v. United States, 424 U.S. 800 (1976) (Akin), to be taken into account in determining whether wise judicial administration dictates that a water rights adjudication in federal district court should be dismissed in favor of proceedings in state court, the Ninth Circuit Court of Appeals in the instant case noted that the United States is subject to serious conflicts of interest in its representation of the Montana Indian Tribes, and that the Tribes may not have the right to intervene in state court proceedings to protect their interests. Northern Cheyenne

Tribe v. Adsit, 668 F.2d 1080, 1089-1090. In that event, the Tribes would be necessary parties who could not be joined. Since the United States is unable to adequately represent the Tribes, they cannot be bound by the outcome. U.S. v. Truckee-Carson Irrigation District 649 F.2d 1286 (9th Cir. 1981) cert. granted, 51 U.S.L.W. 3287 (1982) (No. 81-2276).

The Chippewa-Cree Tribes will seriously consider intervening in United States v. Aageson, supra, if the decision of the Ninth Circuit Court of Appeals in the instant case is upheld, in order to protect the Tribes' interests from the conflicts of interest to which the United States is subject in its representation of the Tribes. Such intervention by the Chippewa-Cree Tribes would join a necessary party and assure the comprehensiveness of the federal court proceedings.

The Tribes will probably not intervene in state court proceedings in the event the Ninth Circuit decision in this case is reversed because they do not want to risk being bound to the outcome of an attempted adjudication of their water rights in Montana state courts, and because continuing supervisory and enforcement jurisdiction of the State of Montana over their water rights following a final water rights decree will constitute a major erosion of tribal governmental jurisdiction and sovereignty and will render the Tribes' rights vulnerable to the kind of politically-motivated assaults which have characterized relations between Indian Tribes and the states since the founding of this nation. The Chippewa-Cree Tribes believe that the federal courts are the appropriate forum for the adjudication of Indian reserved water

rights, as they are relatively independent of state politics and are more likely to give fair and impartial consideration to Indian rights. Elected state court judges are necessarily responsive to their non-Indian constituencies, who have traditionally opposed Indian interests, whereas the permanent appointments of federal judges insulate them from local politics and parochial pressures.

CONCLUSION

The decision of the Ninth Cicruit Court of Appeals should be affirmed.

Respectfully submitted,

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